

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Reporters Committee for)
Freedom of the Press,) File No. 20-mc-00082
) (PJS/TNL)
)
Plaintiff,)
) Minneapolis, Minnesota
v.) October 22, 2021
) 11:00 a.m.
United States of America,)
)
Defendant.)

BEFORE THE HONORABLE PATRICK J. SCHILTZ
UNITED STATES DISTRICT COURT JUDGE
(VIDEO STATUS CONFERENCE)

APPEARANCES

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P R O C E E D I N G S

IN OPEN COURT

THE LAW CLERK: United States District Court for the District of Minnesota is now in session, the Honorable Patrick J. Schiltz presiding.

THE COURT: Good morning, everyone. We're here today for a status conference in a case that's entitled In re Application of the Reporters Committee for Freedom of the Press to unseal certain search warrant materials. The case is 20-mc-82.

If I could have just everybody make their appearances, please. Let's begin with the plaintiff's attorneys.

MS. GRAHAM: Megan Graham on behalf of petitioner Reporters Committee for Freedom of the Press.

MS. WALKER: Good morning, Your Honor. Aleita Walker with Ballard Spahr.

MS. CRUMP: Good morning, Your Honor. Catherine Crump. And with us today are a couple of our students. Is it all right if they introduce themselves?

THE COURT: Sure.

MR. ABRAHMS: Good morning. Johnny Abrahms with petitioner Reporters Committee for Freedom of the Press.

THE COURT: Good morning.

MS. DEL ROSARIO: Good morning. Daniela del

1 Rosario Wertheimer with Reporters Committee for Freedom of
2 the Press.

3 THE COURT: And good morning.

4 Is that everybody on the plaintiff's side?

5 Then Mr. Rank.

6 MR. RANK: Thank you, Your Honor. Timothy Rank
7 appearing on behalf of the United States. And along with
8 me -- I don't want to steal his thunder -- but David Fuller
9 is here as well.

10 THE COURT: And good morning to both of you as
11 well.

12 Then Lou Jean Gleason is here from my court, and
13 my law clerk and extern are listening in as well.

14 So, let's see, Ms. Graham, maybe you can bring me
15 up to date on where we're at and what you propose for next
16 steps.

17 MS. GRAHAM: Absolutely. As Your Honor is aware,
18 in December 2020, the Reporters Committee initially filed an
19 application with this court to unseal and docket certain
20 Stored Communications Act search warrant applications. The
21 application generally sought to unseal dockets and the
22 underlying material in SCA warrant cases that were filed
23 after January 1st, 2018.

24 On February 24th of this year, we held a status
25 conference during which RCFP learned that at least some of

1 the relief that was sought in the application was already
2 regularly occurring in the district.

3 The Court denied the application without prejudice
4 and encouraged RCFP and the government to talk with each
5 other and the Clerk's Office to determine what current
6 practices are and ways in which the public's right of access
7 to the courts can be better vindicated.

8 In the ensuing months, RCFP and the U.S.
9 Attorney's Office have had numerous calls and email
10 exchanges. Some of those have included the Clerk's Office.

11 I want to note that both the Clerk's Office and
12 the U.S. Attorney's Office have been very helpful in
13 explaining elements of the process that aren't immediately
14 apparent to outside observers. And over that time, RCFP has
15 gained a much better and more granular sense of the
16 docketing and sealing practices related to search warrants
17 and surveillance orders a little more broadly.

18 So last week we filed the joint letter setting
19 forth two changes that RCFP believes would improve
20 transparency and access. The government doesn't oppose
21 these changes. And it's our understanding that the Clerk's
22 Office believes they're feasible.

23 So the first of those changes would be to add
24 flags -- I think that's the official ECF terminology -- to
25 the dockets for all surveillance applications. This would

1 include Rule 41 search warrants, SCA warrants, Section
2 2703(d) orders, pen register and trap and trace orders,
3 tracking device warrants and All Writs Act orders.

4 Applications that are filed under multiple
5 authorities would have each appropriate flag for whatever
6 authority is invoked in the application, and this would be
7 on a perspective basis.

8 The change from RCFP's perspective would enable
9 the public to differentiate between dockets of various types
10 of requests and to gain information including how many --
11 just, like, the baseline question of how many of each type
12 of application is filed every year.

13 The second change would be to add clearer language
14 to the court's public website about the availability of the
15 materials and how to access them.

16 Right now when a member of the public tries to
17 access the underlying materials in an unsealed warrant case,
18 there's a warning that says you do not have permission to
19 view this document. The materials are, however, available
20 in the Clerk's Office at the public terminal where they can
21 be viewed for free or printed out for fees that mirror what
22 an ECF user would pay for digital access.

23 It's our understanding that that warning is hard
24 coded into CM-ECF, so the Clerk's Office can't change it,
25 which is why we're hoping that the changes to the court's

1 public website would clarify what the access actually is and
2 kind of hopefully counteract the confusing language on ECF.

3 So those are the two changes that we have proposed
4 and, again, the government doesn't oppose. And we're
5 looking for the Court's help in how to effectuate those
6 changes, because there have to be some behind-the-scenes
7 changes to the system.

8 THE COURT: Okay. Let me just talk through these
9 categories. Just, again, I probably said this last time we
10 were together -- I've worked on 200 cases since we last
11 talked, so I've probably forgotten a lot of what we've
12 talked about -- so Rule 41, those are just basic search
13 warrants, right, your basic application to search a house or
14 something?

15 MS. GRAHAM: Right.

16 THE COURT: And right now my understanding is --
17 Lou Jean, you can help make the record clear on this, but we
18 do open files on all those, right, every time there is a
19 search warrant applied for? Lou Jean, can you hear me?

20 LOU JEAN GLEASON: I can. Sorry, Judge. Yes, we
21 do.

22 THE COURT: Okay. Do you know, are those opened
23 at the time the search warrant is applied for or only after
24 they're granted? Do you know how the timing of that works?

25 LOU JEAN GLEASON: I believe they're opened after

1 it's granted.

2 THE COURT: Okay. So if it's denied, your
3 understanding is it's just the papers are returned to the
4 government? We never open anything?

5 LOU JEAN GLEASON: That's my understanding.

6 THE COURT: All right. Mr. Rank, is that the way
7 you understand it works?

8 MR. RANK: It is, Your Honor. I believe that is
9 accurate.

10 THE COURT: Okay. So at least under our current
11 practice if a search warrant application is denied, there's
12 nothing we can flag because there's no file, right?

13 MR. RANK: I think that's right, Your Honor.

14 THE COURT: Okay. But if it's granted, though, we
15 do have an ECF file and we can flag that with appropriate
16 language, right? Lou Jean, there's no problem from our
17 perspective on that?

18 LOU JEAN GLEASON: That's correct.

19 THE COURT: Okay. And in terms of a warrant
20 issued pursuant to the Stored Communications Act, is that
21 basically the same as what we just talked about?

22 MR. RANK: It is, Your Honor.

23 THE COURT: Okay. So if granted we have a case
24 file somewhere and there is nothing on ECF? There is not
25 even a sealed docket on ECF, right?

1 LOU JEAN GLEASON: That's my understanding.

2 THE COURT: Okay. Now, you mentioned as a
3 separate category orders pursuant to 2703(d). Is that just
4 an order granting an application of the Stored
5 Communications Act or is that something different?

6 MS. GRAHAM: They're slightly different. What we
7 refer to as 2703(d) orders are not warrants, but they are
8 court orders permitting the government to obtain certain
9 categories of information from third-party providers. So
10 it's all within the Stored Communications Act, but it's a
11 different provision of Section 2703 than the warrant
12 provisions.

13 THE COURT: Okay. So is there still an -- I
14 apologize, as a district judge I don't deal with any of this
15 stuff, so this is all unfamiliar to me. So is there an
16 application for these orders?

17 MS. GRAHAM: Yes, Your Honor.

18 THE COURT: And how do we process those
19 applications? Do we process them like standard search
20 warrant applications or in some different way?

21 MR. RANK: Your Honor, they are actually -- sorry,
22 Lou Jean. They get processed slightly differently because
23 they get a case number when the application is made. And so
24 when it is submitted to the magistrate judge for signing,
25 there's a case number. It's electronically filed, and I

1 think that starts with the application filing.

2 And just by way of background, Your Honor, Section
3 2703 creates sort of three categories of being able to
4 obtain information relating to electronic communication
5 services, remote computing services: what you can do with a
6 subpoena, what you can get with a search warrant, and then
7 something slightly in between, which is that 2703(d) order.
8 It requires a little bit more of a showing than a subpoena
9 but less than probable cause. And you get sort of middle
10 ground information -- email headers, things like that --
11 that are not available with the subpoena but not the content
12 that you would get with a search warrant.

13 THE COURT: Okay. So I assume, then, that we
14 would flag these things. The letter says orders, but we
15 would be flagging the applications, right?

16 LOU JEAN GLEASON: That's my understanding.

17 THE COURT: Applications for orders, okay.

18 And then, again, it sounds like there's no problem
19 with that from our perspective; is that right, Lou Jean?

20 LOU JEAN GLEASON: That's correct.

21 THE COURT: Okay. And then another category that
22 you mentioned that's in your letter is orders under the All
23 Writs Act. I had to ask my law clerk to remind me what the
24 All Writs Act was -- I mean, I've heard of it, obviously --
25 and her answer was it's something that litigious prisoners

1 use. I take it that's not the category. Then I went to
2 Wikipedia and found out that this is what the government has
3 used to try to get, like, Apple to open up Apple iPhones and
4 things like that. Right?

5 Mr. Rank, has your office used the All Writs Act
6 as sort of a search warranty-type thing?

7 MR. RANK: So very seldom, Your Honor. I think I
8 can count on probably one hand the time that it's been done.
9 My recollection in the district is we've used them for
10 getting information from providers like Uber who have
11 concluded or at one point in time took the position that
12 they were neither an electronic communications service nor a
13 remote computing service and, therefore, 2703 did not apply
14 to them. They have actually changed they're position on
15 that, but there was a time period where we needed to use the
16 All Writs Act for purposes of getting information back from
17 Uber.

18 THE COURT: Okay. How would that work
19 procedurally, then? Do you file an application for a writ
20 basically?

21 MR. RANK: Yes, file an application for a writ
22 with the duty magistrate. And Lou Jean would know better
23 than I the answer to this question, whether an ECF file is
24 created upon the application for it. We've done so few of
25 them. And, frankly, I can't remember the last time we've

1 done one. It may have even been done before the new
2 application and case number obtaining procedures that were
3 started. So, Lou Jean, do you know?

4 LOU JEAN GLEASON: I didn't look those up, but
5 they would be created the same as a 2703, so there would be
6 a case opened.

7 THE COURT: Okay. So we would need some way to
8 describe -- obviously, it's not every application for an All
9 Writs Act. It's the quasi search warranty government
10 obtaining information for use in a criminal investigation is
11 what we're talking about. Okay. So all that sounds doable.

12 Orders for pen registers and trap and trace
13 devices. Now, that's handled differently, right, Lou Jean?

14 LOU JEAN GLEASON: Yes. Those are sealed cases
15 that are not unsealed.

16 THE COURT: Okay. So by "sealed cases" does that
17 mean that if -- can somebody go online and actually see a
18 number there that says this is a sealed case and that's all
19 they see, is kind of a splash thing, or do you not even see
20 that? Is it invisible to the public?

21 LOU JEAN GLEASON: If they knew the case number,
22 it would say this case is sealed. That's all they will see.

23 THE COURT: So can we flag such a --

24 LOU JEAN GLEASON: No.

25 THE COURT: Okay. So we would have to change the

1 way we handle those then --

2 LOU JEAN GLEASON: Correct.

3 THE COURT: -- in order to flag them. Okay.

4 So, Mr. Rank, Ms. Graham said the government
5 doesn't have any objection to flagging these. What do you
6 envision we would do to make them flaggable?

7 MR. RANK: Well, I guess our perspective is we
8 wouldn't have any trouble flagging them. But if it requires
9 a change in the way that the sealed cases are done, we
10 probably would have an objection to that.

11 I think what we don't have an objection to is some
12 sort of -- and I think this is what the Reporters Committee
13 was looking for -- some methodology of figuring out how many
14 types of process were used in a particular year.

15 A lot of our discussion has been how has it been
16 the outside can figure out -- public can figure out how many
17 pen traps have been done in a particular year, and we
18 wouldn't have an objection to some sort of recordkeeping
19 like that.

20 But anything that would, for example, indicate
21 what the pen traps were for -- particular telephone number,
22 a particular account number -- we have an objection to that
23 being public because they are sealed and they're sealed by
24 operation of statute.

25 THE COURT: Okay. So, Lou Jean, can we flag these

1 cases in a way that makes them -- I'm sorry, Ms. Crump
2 dropped off. It rearranged all of you. You're over here
3 now, Lou Jean. Can we flag these in a way that we can
4 collect data on these cases, even though they're sealed?

5 LOU JEAN GLEASON: We can collect the data
6 internally, but it wouldn't be available to the public
7 unless there was something on our website that would make
8 that information available.

9 THE COURT: So, Ms. Graham, what are you asking --
10 with respect to -- I gather tracking device warrants,
11 they're handled the same as trap and trace kind of stuff?

12 LOU JEAN GLEASON: Yes.

13 THE COURT: Okay. So what are you envisioning
14 with respect to these, which are now sealed cases, which
15 unless you know a case number you can't even get to the
16 splash screen?

17 MS. GRAHAM: So this, I think, is where some of
18 the disagreement between the government and RCFP comes in to
19 play. It's RCFP's position that the cases for PRTT -- pen
20 trap orders -- showed some amount of information at the time
21 of filing should be made public, should be unsealed.

22 So our vision is creating a mechanism by which
23 even though the underlying materials might remain sealed,
24 the docket would still be public at which point the flag
25 indicating that a particular case number is a PRTT request

1 would be -- the public would have that information. It
2 would know.

3 So this would be similar to what currently happens
4 for search warrants and SCA warrants where the document
5 number isn't sealed. Right? So at time of filing when you
6 go to those, you can at least see the case does exist. You
7 don't have access to any of the materials, like the entries
8 themselves or the underlying documents, but you at least
9 know that there's an MJ case that has search warrant in the
10 title of the case and where we're hoping eventually there
11 will be a flag to indicate this is a Rule 41 versus an SCA
12 search warrant.

13 THE COURT: Okay. So we need to change the way
14 that we handle it internally for the flags to do anybody any
15 good.

16 MR. RANK: Your Honor, I can say that the
17 government would not have an objection to having an ECF
18 system in which the line on ECF said something to the effect
19 of application for an order for a pen trap and trace device
20 on a T-Mobile account and nothing more -- not the telephone
21 number, not the identifier or a Google account without the
22 actual identifier of who it was that we were seeking the
23 Google account for, gmail account or something like that.

24 So if the idea is that it would change the way ECF
25 looks to simply say application for pen trap order for

1 T-Mobile account, that would not be something the government
2 would have a problem with because it would still be sealing
3 the underlying documents, still be consistent with the
4 statute. And just like a search warrant, that's kind of
5 what you see in the order, that's what you would see.

6 THE COURT: So when you look at it -- when you
7 look at one, two, three, four, five, those would all just
8 say sealed, sealed, sealed, sealed, sealed?

9 MR. RANK: Exactly, but they have a title on them
10 that would reflect that it's a pen trap. I think it would
11 be helpful -- we've been talking to the Reporters Committee.
12 They'd like a differentiation between, for example, pen
13 traps on phones, pen traps on email accounts, things like
14 that. So it does give that more granular distinction but
15 doesn't identify the actual entity or number being tracked.

16 THE COURT: Okay. So is that what our basic
17 search warrant cases look like before they're unsealed, same
18 thing, in re a search warrant for -- what does one of these
19 things look like?

20 MR. RANK: So the ECF line says whatever the
21 caption says. So on a standard AO form for the search
22 warrant there is a caption in there and it can say a lot of
23 different things. Sometimes it says in re Google accounts.
24 Sometimes it says the actual Google name.

25 And so the practice is going to have to be that if

1 we want to maintain some level of generality for that
2 information, the captions of the search warrants, which the
3 government has control over, will have to be done at a level
4 where it's not understandable who is being searched from the
5 caption of the search warrant.

6 THE COURT: Okay. So, Lou Jean, is this doable
7 from our perspective, that is just to make the pen trap type
8 of cases look like our search warrant cases while they
9 remain sealed?

10 LOU JEAN GLEASON: It's doable, but our local
11 rules currently say that they are sealed, so that might be a
12 little change there.

13 THE COURT: So we would have to change the local
14 rules to go from sealing the case to sealing the materials
15 filed in the case? Is that the difference?

16 LOU JEAN GLEASON: Yes.

17 THE COURT: Okay. So, I mean, I think everything
18 we've talked about then so far, as well as the language to
19 the website, that's totally fine. We should probably make
20 the changes first and then change the language on the
21 website so we know what we're describing.

22 This is all something you don't need to litigate
23 about. We often have members of the public who ask us to
24 change our rules and our practices, and we just work with
25 them on it.

1 I was going to say I have to talk to the Chief
2 Judge about how to do this, but I think I can talk to him,
3 even though he is recused in the litigation itself,
4 procedurally how he wants to set this up. In eight months I
5 can talk to myself, but right now I can't talk to myself. I
6 have to talk to Judge Tunheim.

7 So let me just work internally to figure out how
8 best to go about making these changes. We don't need to
9 litigate about it at this point. Obviously, if we end up
10 with a situation you think is unsatisfactory, we can move to
11 litigation, but I think we should continue to work on these
12 like we work on changes to our local rules.

13 Okay. So that's what you've agreed upon. What
14 about the disagreements?

15 MS. GRAHAM: Yes. So based on what RCFP learned
16 from the U.S. Attorney's Office and the Clerk's Office about
17 current practices, we made requests for a couple of other
18 changes to protect the public's right of access.

19 As outlined in the joint letter, there are two
20 main areas where the government and RCFP do not currently
21 agree. The first is that -- and we alluded to this
22 earlier -- RCFP believes that the district should apply the
23 same docketing and unsealing practices that it currently
24 uses for warrants to applications for Section 2703(d) and
25 pen register trap and trace orders.

1 So as we discussed --

2 THE COURT: The docketing part we just talked
3 about, right?

4 MS. GRAHAM: Right. Exactly.

5 And on the sealing side that would mean that the
6 applications, orders, and related materials should be
7 unsealed after six months absent an individualized showing
8 of the need for continued sealing.

9 THE COURT: Is that what we do now? I thought it
10 was up to the magistrate to make those decisions with
11 respect to the warrants. Do we have, like, a six-month
12 policy or is it whatever the magistrate orders?

13 MR. RANK: So, Your Honor, typically when we get a
14 search warrant, the initial sealing order, if the warrant is
15 going to be sealed and the related documents are going to be
16 sealed, are sealed for a six-month period. And then to
17 extend that sealing period we go back and have to make a
18 showing as to why continued sealing is appropriate.

19 So the six months is, I would say, generally
20 granted at the time the search warrant is applied for.
21 Usually, because it's during the course of an investigation
22 and tipping the person that's being searched off to the
23 details of the investigation in the affidavit is sort of
24 academic that it's not a good idea to do that. So that gets
25 granted. It's a six-month period.

1 Arguably we could ask for a longer period at the
2 beginning. As a district practice, our office's practice is
3 to ask for six months at the outset and then for extensions
4 depending on the situation between six months and 12 months
5 for an extension of those sealing orders.

6 THE COURT: Okay. So this is kind of the common
7 law of our district? It's not a local rule or anything?

8 MR. RANK: It is not a local rule. It's been our
9 practice. I think for about ten years we have required the
10 sealing orders, and they have not been unlimited.

11 There are many districts across the country that
12 automatically seal search warrants or seal them with a
13 simple application by the government and they are sealed
14 forever. I think that's, in fact, why most of the Reporters
15 Committee cases have started around the country, was to
16 change that practice.

17 Reporters Committee actually thought we followed
18 that practice when they filed it here in Minnesota and then
19 through discussions they have learned that we do not. So I
20 think we are on the -- I think the Court referred to us as
21 the more "sunshiny" end of that practice in the district.
22 But that has just been how we've done things here for -- Lou
23 Jean can correct me -- but over ten years.

24 THE COURT: Okay. So, Ms. Graham, you're not
25 challenging the way we handle Rule 41s, which is generally

1 to do a six-month subject to individual cases. You just
2 want us to sweep in these other categories into the way we
3 handle, like, Rule 41 search warrant applications?

4 MS. GRAHAM: Correct, Your Honor.

5 THE COURT: Okay. Now, Mr. Rank says there's a
6 statute that says we can't treat them that way. This is for
7 your briefing, not for us to argue about now, but is the
8 basis of your challenge that, yeah, the statute says that,
9 but the constitution trumps or is the basis no, we don't
10 read the statute that way or both?

11 MS. GRAHAM: So the statutory language that
12 Mr. Rank was referring to is only for pen register and trap
13 and trace orders. And it's RCFP's position that it doesn't
14 quite say what I think the government says. It says that
15 they will be filed under seal, but it doesn't require
16 permanent sealing.

17 THE COURT: Okay. What about the tracking device
18 warrants?

19 MS. GRAHAM: So tracking device warrants -- and,
20 Mr. Rank, maybe you can provide a little more clarity -- I
21 believe those are actually handled very similarly to Rule 41
22 warrants because they are a warrant. They're just sought
23 under a specific statutory authority that's different from
24 Rule 41 or Stored Communications Act or things like that.

25 MR. RANK: I agree with everything Ms. Graham

1 said. That's exactly right. The tracking devices are
2 issued pursuant to one of the provisions of Rule 41, so we
3 treat it like a Rule 41 warrant.

4 It's the government's position that the pen trap
5 statute requires sealing. And it's also accurate that
6 2703(d) does not have that same auto sealing language, but
7 our local rules do based on some back and forth discussion
8 that I think Your Honor was a part of when we were modifying
9 the local rules back about ten years ago to change this
10 provision.

11 THE COURT: Okay. I'll just nod as though I
12 actually remember that, but I don't. That would have been a
13 long time. This wouldn't have been one of the areas I
14 would've focused on.

15 So one of your disputes, then, is whether we can
16 treat pen register and trap and trace device applications as
17 the way as we treat warrant applications, right?

18 MS. GRAHAM: Yes, and also the 2703(d) orders.

19 THE COURT: 2703, okay.

20 And then with respect to the All Writs Act, is
21 there any -- I mean, that's like a 250-year old statute,
22 right? Is there anything in there about any of this?

23 MS. GRAHAM: There's nothing in that statute about
24 sealing. RCFP has decided at this point that this
25 litigation is not the best place to have that debate about

1 what is proper under the All Writs Act. So for the areas of
2 disagreement the All Writs Act is not currently on the
3 table.

4 THE COURT: Okay. You want us to docket those
5 differently, but there's nothing else that's going to be in
6 dispute on those?

7 MS. GRAHAM: Yes. So, as Mr. Rank said, it's our
8 understanding those are quite rare, so on a going-forward
9 basis when they are filed to have that flagging system.

10 But as far as the other docketing and sealing
11 procedures, RCFP doesn't think this is the best venue to
12 have that discussion because it is so different.

13 THE COURT: All right. So broadly speaking, then,
14 you would like us to treat the pen trap applications and the
15 2703(d) orders the same way that we treat warrants and SCA
16 warrants, right?

17 MS. GRAHAM: Yes, Your Honor.

18 THE COURT: Okay. Now, you use -- again, I'm
19 sorry about my ignorance about this -- in your letter you
20 talk about surveillance applications. Is that -- oh,
21 because there's different categories under the Stored
22 Communications Act; is that right?

23 MS. GRAHAM: Yeah. That language is because some
24 of these requests are for warrants and some are for orders,
25 and so we just kind of grouped them together as surveillance

1 requests.

2 THE COURT: SO you are using that language to
3 encompass all warrants, 2703(d), and subpoenas, right?

4 MS. GRAHAM: The subpoenas have not been part of
5 the discussion. The court orders and the warrants under
6 these various authorities.

7 THE COURT: Okay. Not the subpoenas. Okay.

8 And then the second broad area of your
9 disagreement is denial on amended applications for warrants
10 and I assume these other things as well.

11 Mr. Rank, how does this work now? When you go to
12 a magistrate judge and seek a warrant, if they just say no
13 and that's the end of it, there's no record on ECF that you
14 even asked for it, right? That was our discussion awhile
15 ago.

16 MR. RANK: That is my understanding, Your Honor.

17 THE COURT: Okay. So then if the magistrate judge
18 does -- again, I don't think I've ever signed a search
19 warrant application. They don't come to us district judges.
20 So if the magistrate judge thinks you need a little more
21 here or a little more there, just what does that look like,
22 that back and forth?

23 MR. RANK: So, generally speaking, what happens is
24 there's a read-ahead of a search warrant application that
25 goes to the duty magistrate, and that read-ahead is all the

1 search warrant documents, including the affidavit in support
2 of the search warrant.

3 A duty magistrate will review all the materials.
4 And if there is a situation in which the duty magistrate
5 says, for example, I think you need more probable cause with
6 respect to this particular thing -- let's say you've got a
7 Rule 41 warrant and you want to look in a house and a garage
8 and the magistrate judge says, for example, I see how you
9 have nexus between your probable cause and getting into the
10 house, but I don't see it for the garage and I need some
11 more information on how the garage is relevant to your
12 investigation and your probable cause, the magistrate may
13 give it back to the agent and say if you beef this up, I
14 will approve it.

15 So there may be a rewrite at that point in time,
16 additional information put into the affidavit to support
17 getting into the garage or the agent may say, you know what,
18 I don't think I have something specific to get in there,
19 I'll take that off of the request. Those are two options.
20 And at that point in time, the application would be
21 resubmitted. The magistrate would look at it and say, yes,
22 I'm good with this. Thank you for the additional
23 information on the garage. I'll sign it. Or thank you for
24 taking the garage off, I'll sign the warrant with respect to
25 the house. And that is the warrant that gets filed on ECF

1 and put into the court's system.

2 THE COURT: What does this back and forth
3 communication look like? Are you doing this in person? Are
4 you emailing each other or talking to each other on the
5 phone?

6 MR. RANK: So it has evolved through the pandemic,
7 Your Honor. The old model of presentation of search
8 warrants was an agent would make an appointment with the
9 duty magistrate, would email a read-ahead to the
10 magistrate's chambers. It would be reviewed. And then the
11 final version of the search warrant would come with the
12 agent into the judge's chambers for review and signing of
13 the affidavit and the search warrant.

14 So the agent swears it out in front of the
15 magistrate judge. The judge signs it, packet is put
16 together, and the search warrant is completed.

17 When the pandemic started, the court pivoted to
18 using some forms of remote presentation, and so now the
19 first part of that is still followed where the read-ahead
20 goes ahead via email. The second part of the presentation
21 is done by Zoom, by FaceTime, whatever technology both the
22 agent and the magistrate have for executing.

23 And so it's roughly the same process, but it's
24 simply done by emailing the signed packets back and forth.
25 The agent swears out the affidavit but does it via FaceTime

1 or Zoom and then sends that packet typically via email to
2 the magistrate who reviews it, signs it, and sends it back
3 to the agent for execution.

4 THE COURT: So there's basically no record of this
5 in our system except for the final warrant application and
6 the final warrant? So the back and forth, none of that is
7 preserved in our ECF system?

8 MR. RANK: That's my understanding, Your Honor.
9 That's certainly not preserved in the ECF system, that's
10 correct.

11 THE COURT: So, Ms. Graham, what is it that your
12 folks are looking to have us change regarding this practice?

13 MS. GRAHAM: So RCFP believes that when the
14 materials are presented to the judge, that is when they
15 should be docketed. So that is whether they are denied.
16 Regardless of whether there's a written opinion about the
17 denial, they should be docketed. There should be a paper
18 trail that that request was sought or that application was
19 filed.

20 We also believe that the applications when they're
21 presented to the judge, even if they're amended, should all
22 be captured on the docket.

23 So I guess the change, just as an example would
24 be, you know, as Mr. Rank described, that first application
25 would probably be docket entry 1. Right? There would be

1 some notation that there was an amended application filed,
2 which would either cut out the garage or add a showing
3 regarding the garage. And then that would be the amended
4 application. And then the order granting it, for example,
5 would follow on. So the rest of the docket would look the
6 same.

7 THE COURT: So you're not asking that magistrates
8 and the government be forced to put all this in writing and
9 docket all of it? They can still communicate back and forth
10 with each other verbally? If there is an amended
11 application, you want to see both the original and the
12 amended?

13 MS. GRAHAM: Correct, Your Honor. Yes. It is not
14 the conversations of the swearing in all be written down or
15 orders be written, but it is keeping track of the evolution
16 of that application, that that be captured somewhere and
17 reflected on a docket.

18 THE COURT: And also to, I guess, create cases for
19 rejected applications?

20 MS. GRAHAM: Correct.

21 THE COURT: Okay. And the government objects to
22 all this, Mr. Rank?

23 MR. RANK: It does, Your Honor.

24 THE COURT: Okay. As I said, I don't want to have
25 a fight open up here. I'm just trying to figure out what

1 we're about.

2 Okay. And I take it from your letter that all
3 this would be subject to the same kind of unsealing, six
4 months, you know, longer if necessary, that kind of thing?

5 MS. GRAHAM: Yes, Your Honor.

6 THE COURT: Okay. Is there anything else? I
7 think that covers the two things mentioned in the letter.
8 Is there anything else that you are disagreeing about right
9 now?

10 MS. GRAHAM: No, Your Honor. We did our best to
11 try to define the exact areas where there is still
12 disagreement, so those are the two.

13 THE COURT: There are other things -- I didn't
14 have time, I'm sorry, we're super busy these days, but I
15 didn't have time to go back and read your original papers.

16 I recall there was some other stuff in there.
17 That's stuff you're just not pursuing at this time after
18 your discussions with our Clerk's Office and the Government?

19 MS. GRAHAM: Correct, Your Honor, or they were
20 things that were already happening in the district.

21 THE COURT: Okay. So here's what we'll do then,
22 is I will have my Courtroom Deputy -- she is not in today,
23 but she will be in on Monday -- I'll have her contact you
24 and get you a hearing date. Okay? And then I think it's 45
25 days before that hearing go ahead and file a motion to -- I

1 don't know what it would be, whatever you want to label it,
2 but a motion for relief or a motion for something or other,
3 and then file an affidavit [sic] with -- not affidavit,
4 sorry, memorandum and anything else you want. We'll treat
5 it like a dispositive motion under our rules. So follow our
6 rule, Rule 7.1 on dispositive motions, and just brief it
7 that way.

8 And then, Mr. Rank, I know this is -- we're in
9 such an awkward position because I know you're not a party,
10 but, I mean, if the Government opposed the relief sought, I
11 need you to file a response brief and explain why.
12 Effectively we're going to treat you as though you are the
13 opponent.

14 Anything the two of you agree on I doubt very much
15 my court will independently object to, as long as it's
16 technologically feasible for us. So let's just proceed that
17 way. So just tee it up like a dispositive motion.

18 I have to warn you, as I know Mr. Rank can tell
19 you, we are really, really backed up because of the
20 pandemic. We couldn't try criminal cases for however long,
21 and we have a big back-up of trials. We also couldn't try
22 civil trials. I've got parties who have waited four years
23 for a civil trial. And I'm going to be in trial mostly
24 between now and, I think, the end of March at this point.
25 So it's just -- this won't be quick, but we'll be diligent

1 if slow. So I'm warning it will take a little while. I
2 don't have time. I'm in court constantly between now and
3 the end of -- as of now and the end of March. But we'll do
4 our best to resolve.

5 In the meantime, I will talk about getting our
6 internal mechanisms operating to try to get the stuff that
7 you have agreed on implemented. I'll talk to Lou Jean and
8 I'll talk to the Chief Judge and we'll figure out how to
9 best proceed internally.

10 It all sounds like a good idea to me. I doubt
11 very much any of our judges will have any problems with the
12 stuff you've agreed on. It's just a matter of getting our
13 local rule amended and getting our internal processes
14 adjusted, and we'll work on that.

15 When I next see you, I'll talk to you about
16 whatever progress we've made. Hopefully, we'll have it done
17 by then. Okay?

18 Anything else you need to talk to me about this
19 morning?

20 MS. GRAHAM: No, Your Honor. Thank you.

21 THE COURT: Okay. Anything else on your side,
22 Mr. Rank?

23 MR. RANK: Nothing from the government, Your
24 Honor.

25 THE COURT: I may pull you in. I don't know what

1 this internal process for implementing the agreed-upon
2 changes is going to look like, but I may ask each of you to
3 have a representative on a committee or something to help us
4 work that through. But let me talk to the Chief Judge first
5 and we'll see where we go.

6 MR. RANK: Thank you, Judge.

7 MS. GRAHAM: Thank you.

8 THE COURT: Thank you, everyone. Have a good
9 weekend.

10 MS. GRAHAM: You, too. Bye.

11 (Court adjourned at 11:43 a.m.)

12 * * *

13 I, Debra Beauvais, certify that the foregoing is a
14 correct transcript from the record of proceedings in the
15 above-entitled matter.

16 Certified by: s/Debra Beauvais
17 Debra Beauvais, RPR-CRR
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